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In the Supreme Court of the United States

_____TERM, 19_____

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Collector of Revenue for the State of Louisiana, now Ashton J. Mouton, Successor in office to Roland Cocreham, hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, in Number 23,402, Mississippi River Fuel Corporation, et al versus Roland Cocreham, Collector of Revenue, State of Louisiana.

OPINIONS BELOW

1.

The application for a rehearing was denied by the United States Court of Appeals for the Fifth Circuit. The majority opinion and the dissenting opinion on the application for a rehearing are not reported. They are appended hereto as Appendix A.

2.

The opinion of the District Court, Eastern District of Louisiana, Baton Rouge Division, which

granted judgment to the petitioner, is reported in 247 F. Supp. 819. The opinion and judgment are appended hereto as Appendix B.

3.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 382 F. 2d 929. The opinion and the judgment are appended hereto as Appendix C.

JURISDICTION

The decree of the United States Court of Appeals for the Fifth Circuit was entered and signed on September 13, 1967. A petition for a rehearing was denied by a three judge panel, with one judge dissenting, on January 8, 1967. An order staying the mandate of the Court for sixty days from January 16, 1968 was signed by Judge John Minor Wisdom, on January 16, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 28 U.S.C. Sec. 1651(a). A writ of certiorari is applied for on three grounds.

1.

The federal courts do not have jurisdiction of the subject as a matter of *federal law*. Jurisdiction in the federal courts cannot be conferred by either the States or by private litigants.

2.

The State of Louisiana has never consented to be divested of its sovereignty over the oil and gas within

its territorial limits and has never relinquished its power to conserve its natural resources lying within its boundaries.

3.

In the alternative, Congress retroceded to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, within federal enclaves.

With reference to one and two above the following statement is added. The collection of millions of dollars in present and future taxes by not only this State but also by other States depends on the decision of this case. The collection of these taxes in no way diminishes the tax collections of the United States because the taxes are on the private operations of private parties who, except for the fact that their operations take place in federal enclaves, would be subject to the tax. Yet the services which the state must provide these individuals and corporations is in no way diminished by the fact that they operate in federal enclaves. Therefore, the question presented by this case, especially with reference to the Buck Act, is of paramount importance and of great interest not only to this State but to all other States in which there are federal enclaves.

QUESTIONS PRESENTED FOR REVIEW

1.

May a State, or may parties to an action confer jurisdiction on the federal courts in matters relating

to State taxes when the aggrieved taxpayer has a complete and adequate remedy in the State Courts?

Title 28, U.S.C.A., Section 1341 states that federal courts do not have jurisdiction in such cases.

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

2.

Is the sovereignty of the State of Louisiana over its oil and gas limited when the severance of the minerals take place in a federal enclave?

The fundamental law of Louisiana oil and gas is that title to such minerals do not pass with title to the lands under which they lie. By operation of law acts of sale or donation by which title to land is passed in Louisiana, whether to the United States or private parties, is subject to this fundamental law. Oil and gas within the territorial limits of Louisiana are Louisiana natural resources and the State, in its Constitution, has retained the sovereign power to conserve those resources and to regulate the severance thereof.

3.

In the alternative, did Congress, by means of the Buck Act, *Title 4, U.S.C.A., Sections 5-10*, retrocede to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, on private businesses operating in federal enclaves? In other

words, did not Congress, by means of the Buck Act, remove the cloak of federal tax immunity from private enterprises which operate in federal enclaves?

STATUTES AND REGULATIONS INVOLVED

The following United States constitutional provision and United States statute are involved.

Article 1, Section 8, Clause 17, United States Constitution.

"The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other Needful Buildings."

Title 28, U.S.C.A., Section 1341

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF FACTS

Respondents are lessees under oil and gas leases from the United States covering portions of Barksdale Air Force Base, Bossier Parish, (County), Louisiana. Respondents are producing oil and gas from

these lands and Petitioner, Collector of Revenue of Louisiana, hereinafter referred to simply as "Collector", is seeking to collect severance taxes on respondents' portion of such production. No taxes are asserted against the United States' portion of the production. The taxes are resisted by respondents on the grounds that the Collector is without legal authority to levy and collect such taxes on production of oil and gas underlying the air base because the United States has exclusive jurisdiction over the base.

Under Louisiana law a taxpayer has two methods whereby he may resist the payment of taxes: (1) he can pay the taxes under protest and sue for their recovery; or (2) he can wait until the tax is assessed and then apply to the Louisiana Board of Tax Appeals for a redetermination of his assessment. This second remedy does not require that the taxpayer pay the tax at that time. The assessed taxpayer may appeal an adverse ruling of the Board of Tax Appeals to the courts. The tax is not paid unless there has been a final judicial determination of the case adverse to the taxpayer.

Respondents chose to pay the taxes under protest as provided by Title 47 Sec. 1576, Louisiana Revised Statutes of 1950. (Appendix D). However, instead of filing suit to recover the taxes paid under protest in the proper state court the suit was filed in the United States Federal Court for the Eastern District of Louisiana, Baton Rouge Division, Baton Rouge, Louisiana.

The lower federal court rendered judgment in

favor of the Collector on the ground that Louisiana had never ceded to the United States the right to tax minerals extracted from Louisiana lands transferred to the United States.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit and while the appeal was pending that Collector filed a motion to have the case dismissed on the ground that the federal court lacked jurisdiction. This motion was ordered to be carried with the case.

The Fifth Circuit reversed the District Court and overruled a previous Fifth Circuit case, *Mississippi River Fuel Corporation v. Fontenot*, 284 F. 2d 898 (1956), Cert. den 352 U.S. 916, 1 L.Ed. 2d 122, 77 S.Ct. 213, which had been previously litigated between the same parties on the same point of law and which had been decided in favor of the Collector. The Fifth Circuit gave as a reason therefor that a later Supreme Court decision, *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct. 857 (1964) had overruled *Fontenot*, supra. Thereupon the Collector timely filed an application for rehearing and a supplement thereto based on the same specifications of error which are stated and reurged in this petition.

Two appellate court judges denied the application for a rehearing. One judge, in a strong dissent, thought the rehearing should be granted, (Appendix A, page 27), on the ground that Louisiana had never ceded its right to tax oil and gas produced from lands transferred to the United States. The dissent also questioned the wisdom of overruling *Fontenot*, supra.

From the time of the filing of this case in November 19, 1963 to date the taxes paid under protest by respondents herein and *Texas Gas Exploration Company v. Collector*, an identical case, and *Shell Oil Co. v. Collector*, a similar case, the plaintiffs of which have appeared as amicus curiae in this case, amount to $3,784,855.00 with accumulated interest, an accumulation of approximately $75,000.00 a month.

ARGUMENT ON QUESTIONS PRESENTED

1.

Argument on Question No. One

Jurisdiction of the federal courts was conceded by the Collector in this District Court. The question of jurisdiction was first raised after the cause had been appealed to the Fifth Circuit. There the Collector did not argue lack of jurisdiction as a matter of federal law but the argument was based on whether or not the state had waived its sovereign immunity under the Eleventh Amendment. The Fifth Circuit ruled that the State had waived its immunity. *That ruling is not now being questioned.*

The question of jurisdiction as a matter of *federal* law was first presented in the Collector's Supplementary Petition for Rehearing which was filed in the Fifth Circuit a few days before the petition for a rehearing was denied. The question was presented to the Court too late because there is no indication in the opinion of the Fifth Circuit denying the rehearing, (Appendix A, page 27), that the court considered the question of lack of jurisdiction as a matter of *federal law.*

The rule in the federal courts relative to the relief of taxpayers who claim that a state tax is being illegally exacted is that the taxpayer must proceed by way of injunction. But prior to 1937 the federal courts would not enjoin the collection of state taxes if there was a plain and adequate remedy in the state law. At that time when a federal court refused to enjoin the collection of a state tax it was considered more a matter of judicial restraint rather than positive federal law. Later this rule was embodied in the Judicial Code. This is shown by the Supreme Court's decision in *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 297, 87 L. Ed. 1407, 63 S.Ct. 1070, (1942).

> "This withholding of extraordinary relief by Courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts, or of the settled rule that the measure of inadequacy of the plaintiff's legal remedy is the legal remedy afforded by the federal not the state courts (citations). On the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as at law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest (citations) should stay its hand in the public interest when it reasonably appears that private interests will not suffer." (Citations)
>
> * * *
>
> "It is in the public interest that federal courts of equity should exercise their discretionary power

> to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."
>
> * * *
>
> "Congress recognized and gave sanction to this practice of federal equity courts by the Act of August 21, 1937, 50 Stat 738 c 726 enacted as an amendment to Sec. 24 of the Judicial Code, 28 USCA, Sec. 41 (1), 8 FCA title 28, sec. 41 (1). This provides that 'no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.' "

Thus what was formerly a matter of federal practice is now a matter of federal law. Certainly that is the opinion of the Courts of Appeal of two circuits as is shown by the following quotation from *City of Houston v. Standard-Triumph Motor Co.*, 347 F. 2d 194, (5th Cir., 1965), cert. denied 382 U.S. 974, 15 L. Ed. 2d 466, 86 S. Ct. 539. At page 198.

> ". . . Wide as a Court's power must be in the exercise of its discretion whether to grant declaratory relief, the Supreme Court makes clear that 'it is the court's duty to withhold such relief' when, in the words of the Johnson Act, there is "a plain, speedy and efficient remedy . . . in the courts of the state. 319 U.S. at 300-301, 63 S.Ct. at 1074. This is the decision that the Sixth Circuit has twice reached. *Helmsley v. City of Detroit, Mich.*, 6 Cir., 1963, 320 F. 2d 476; *Wyandotte Chemicals Corp. v. City of Wyandotte*, 6 Cir., 1963, 321 F. 2d

927. The critical turning point is the adequacy of the state court remedies. See *Township of Hillsborough, Somerest County, New Jersey v. Cromwell*, 1946, 326 U.S. 620, 66 S. Ct. 445, 90 L.Ed. 358; *Georgia Railroad & Banking Co. v. Redwine*, 1952, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; *George F. Alger & Co. of Detroit, Michigan v. Peck*, S. D. Ohio, 1954, 119 F. Supp. 812, affirmed, 1954, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed. 1120, 1148; *Livingston v. United States*, E.D.S.C., 179 F. Supp. 9, affirmed, 1960, 364 U.S. 281 80 S.Ct. 1611, 4 L.Ed. 2d 1719. Certainly, after emphasizing the pre-Johnson Act equitable limitations congressionally approved and strengthened by the enactment, it is inconceivable that the Supreme Court intended to allow any discretion to grant declaratory relief where adequate state remedies were available."

Certainly if the above is true with reference to declaratory relief as to state taxes which are contested as being illegal it is also true with reference to injunctive relief from state taxes which are contested as being illegal.

It will now be shown that the respondents herein not only had a plain, speedy and adequate remedy at law in the Louisiana Courts but that the remedy has received the express approval of the United States Supreme Court.

Act 330 of 1938, now Title 47, Sec. 1576, Louisiana Revised Statutes of 1950, (Appendix D, page 79) is the Louisiana statute which provides for payment under protest and for a plain, speedy and efficient

remedy at law for the contest of taxes so paid and claimed to be illegal.

In *Huffman*, supra, the United States Supreme Court had this to say about that Louisiana statute. At 319 U.S. 296, 87 L.Ed. 1410:

> ". . . the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." *And Act 330 of 1938 sets up a complete statutory scheme to carry into effect the constitutional provision.* By it the courts of the state are forbidden to restrain the collection of any state tax; and any person aggrieved and "resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto" shall pay the tax to the appropriate state officer and file suit for its recovery in either the state or federal courts. Pending the suit the amount collected is required to be segregated and held subject to any judgment rendered in the suit. If the taxpayer prevails in the suit, interest at two per cent per annum is added to the amount of taxes refunded. (Emphasis Supplied)

In addition to R.S. 47:1576 the State of Louisiana provides an additional procedure for the contest of taxes claimed to be illegal wherein the taxes need not be paid under protest. The statutes on this procedure

are Sections 1431-1438, Title 47, Louisiana Revised Statutes of 1950. (Appendix E, page 81).

Thus Louisiana provides the taxpayer with two plain, speedy and efficient remedies at law. Title 47, Section 1576, Louisiana Revised Statutes of 1950 provides for payment of taxes under protest and suit for recovery. Title 48, Sections 1431-1438, Louisiana Revised Statutes of 1950 requires no payment of taxes at all. When it is made against him the taxpayer simply contests the tax assessment in the Louisiana Board of Tax Appeals. The decision of the Board is subject to judicial review and it is only after an adverse final judgment that the taxpayer is required to pay the tax. Clearly, then, the federal courts have no jurisdiction under Title 28, U.S.C.A. Sec 1341 because Louisiana provides two plain and adequate remedies to the taxpayer who feels that he is being unjustly taxed.

As previously stated the Court of Appeal ruled on the question of jurisdiction from the standpoint of whether or not the State had waived its immunity from suit. This question of jurisdiction from the standpoint of *federal law* was not considered by the Court of Appeal simply because it was not argued by petitioner.

Argument on Question No. Two

We now consider the question: Is the sovereignty of the State of Louisiana over its oil and gas limited when the severance of the minerals take place in a federal area?

Louisiana has always defined oil and gas as a fugitive material which is not susceptible of ownership

until it is reduced to possession. (*Frost-Johnson Lumber Company v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922); *Wright v. Imperial Oil and Gas Products Company*, 177 La. 482, 148 So. 685 (1933); *Ohio Oil Company v. State of Indiana*, 177 U.S. 190, 44 L.Ed. 729, 20 S.Ct. 576 (1900). Oil and gas are contained in certain formations beneath the earth's surface the exact limits of which, with reference to the surface, are never known definitely. Within these formations oil and gas move freely responding only to forces of gravity and pressure. It can and frequently does happen that if a surface land owner does not take steps to protect his interest either by drilling his own wells or by a unitization agreement, that adjacent landowners will drain all oil and gas from beneath his land. When such happens, the oil and gas belongs to the person who reduced it to possession, not the person from under whose lands it was drained. That oil and gas underlying Barksdale Air Force Base might be drained by adjacent landowners was recognized in the leases to plaintiffs by the United States. (R. 87)

Because of the fugitive nature of oil and gas it logically follows that it is never owned until it is reduced to possession and since oil and gas can never be owned until it is reduced to possession it follows that, under Louisiana law, title to oil and gas in place can never be acquired. What a surface owner acquires in Louisiana when he acquires title to land is the right to explore for oil and gas and the right to reduce to possession any oil and gas found. The United States, therefore, acquired no greater right than to explore

for oil and gas beneath the land comprising Barksdale Air Force Base by virtue of Act No. 12 of 1898, and Act No. 31 of 1942 under which acts the land comprising the base was acquired. These two acts were simply authority for the United States to acquire the land, and when the land was acquired by the United States through donation and conveyance the rights of the United States were no greater than those of any other donee or purchaser. There are no Louisiana statutes giving the Federal Government any greater rights as a purchaser or donee than those of any other Louisiana purchaser or donee.

When Louisiana was created as a state it acquired sovereignty over all the lands and minerals within the territorial confines of the State. For the State to be thereafter deprived or limited in its sovereignty over the lands and minerals within its territorial limits it obviously must consent thereto. But it has already been shown that Louisiana ceded neither ownership nor sovereignty to the United States with respect to oil and gas underlying Barksdale Field and in *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 197, 82 L.Ed. 187, 58 St. Ct. 233 (1937), the United States Supreme Court held that acquisition of title to land alone is not sufficient to exclude a State's taxing power within a federal enclave.

> "The acquisition of title is not enough to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuim of jurisdiction which otherwise it would be free to exercise."

The foregoing argument on this question is buttressed by the dissenting opinion of Judge Rives of the Fifth Circuit when the Collector's petition for a rehearing was denied.

The highlights of the dissent are:

1. The State of Louisiana has never consented for the United States to acquire ownership of the oil and gas underlying Barksdale Air Force Base, nor has it given the federal government the unfettered right to reduce to possession oil and gas underneath such lands.

2. *Humble Pipe Line Co. v. Waggonner, supra,* on which the Fifth Circuit based its opinion, decided no more than the question presented by the case, which is, that Louisiana is without jurisdiction to levy an *ad valorem* tax on privately owned property within Barksdale Air Force Base.

3. The majority decision was in conflict with the historic claims asserted by Louisiana in *United States v. Louisiana*, 339 U.S. 699, 702, 94 L.Ed. 1216, 70 S.Ct. 914, (1950). Such claims have never been disputed as to lands lying within the State's boundaries.

4. The State of Louisiana constitutionally reserved the right to levy a charge or tax on its natural resources at the time of their severance from the soil or water.

Judge Rives' dissent so well reasoned and is so well supported by his references and citations that it is reproduced in full in Appendix A at page 27. The Court is asked to consider Judge Rives' dissent as a

part of the argument on this point because to repeat it here would unduly lengthen this brief.

Argument on Question No. Three

In the alternative, the Collector contends that, Congress retroceded to the States the right to levy privilege or excise taxes, as distinguished from ad valorem taxes, within federal enclaves.

Congress and the federal courts have long recognized the problems which arise when two sovereignties, such as our federal system, are operating in the same territory. One of the first problems which arose because of the duality had to do with fugitives who used federal enclaves as sanctuaries. For that reason states have always retained the right and the federal authorities have always recognized that service of process can be made by state officers in federal enclaves and fugitives from states can be apprehended there. The necessity for such an exception to exclusive jurisdiction was recognized early in our federal system because the problem of fugitives has been with us from the infancy of the Republic. What has not been with us until recent years has been the problems created by the immense areas required by the exigences of natural defense, the heavy industrialization of federal enclaves and the greatly expanded acquisition of land by the Federal Government.

Louisiana is a southern state and its climate, terrain and water resources are ideal for the training of soldiers, airmen and seamen. Consequently Louisiana has more than its share of training areas within the

State. In addition, Kitsachie National Forest is located in Louisiana and there are spillways for Louisiana rivers and federal bird sanctuaries in Louisiana's marshlands. All this requires land—plenty of it—and consequently the federal government is the largest landholder in the State. Some of the tracts acquired for these purposes contain as much as a half million acres.

Until recent times the concept of exclusive jurisdiction worked no great hardships on the states. Neither ad valorem nor privilege taxes could be levied where the incidence of taxation took place on federal lands, but the people on those lands were few so no great State expense was required in their behalf. However, with the large influx of servicemen in the military installations and the large number of people who began working in federal enclaves in World War II, serious problems arose. Those problems arose because of the services which must be provided for the families of the military personnel and those people who work, such as schools for their children, sewerage and water service for their homes, police and fire protection, highways and streets and other such services. Yet in most instances those families furnished none of the taxes to provide for such services because a large part of the food they consumed, the gasoline they bought, the personal services they received, the cars they owned and the money they earned were not subject to municipal, parochial or state taxes. The incidence of taxation took place on a federal enclave and under the concept of exclusive jurisdiction no taxes could be levied there.

Congress recognized the inequity of the situation so in Title 4, U.S.C.A. Sections 105-110 it adopted the Buck Act which ceded to the states the right to levy certain *privilege* taxes, as distinguished from *ad valorem* taxes, in federal enclaves. The question then, to be decided in this case is whether or not the Louisiana severance tax is a privilege tax which may be imposed by states in federal enclaves by authority of the Buck Act. The Buck Act and the Louisiana severance tax is now examined with that in view.

4 USCA, Section 106 reads as follows:

> "No person shall be relieved from liability for any income tax levied by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area."

4 USCA, Section 110—contains the following definition:

> "As used in Section 105-109 of this title
>
> * * *
>
> (b) The term 'sales or use tax' means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except

a tax with respect to which the provisions of Section 104 of this title are applicable.

(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term 'state' includes any territory or possession of the United States.

(e) The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any state, shall be deemed to be a Federal area located within such state."

The United States Supreme Court has had occasion to interpret the above two sections. In *Howard v. Commissioners of Louisville*, 344 U.S. 624, 97 L.Ed. 617, 73 S.Ct. 465 (1953), the City of Louisville annexed a naval ordnance plant and surrounding territory. Louisville then levied an occupational tax on employees of the ordnance plant on the value of business done in the city, which included the business done in the federal enclave. The tax was resisted on the basis of two arguments. The first concerned the power and authority of the City of Louisville to annex a territory over which the United States had exclusive jurisdiction. This contention was overruled by the court. The second contention of taxpayer was that the city's occupational tax or license fee was not an "income tax" within the meaning of the Buck Act, and therefore,

jurisdiction to levy such a tax had not been ceded by the United States.

The Court disposed of the above argument by stating that even though the tax in question was not an income tax within the meaning of the laws of Kentucky it was such a tax measured by the definition in the Buck Act. At 344 U.S. 628, 97 L.Ed. 621:

> "Was this tax an 'income tax' within the meaning of the Buck Act? In a prior case, Kentucky had held this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City of Louisville. *Louisville v. Sebree*, 308 Ky 420, 429-431, 214 SW2d 248, 253, 254. But the right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. *The grant was given within the definition of the Buck Act, and this was for any tax measured by net income, gross income, or gross receipts.* In the instant case, the Kentucky Court of Appeals correctly stated that the question was whether the tax was an income tax within the meaning of the federal law. We hold that the tax authorized by this ordinance was an income tax within the meaning of the Buck Act. The City, it is conceded, can levy such a tax within its boundaries outside the federal area. By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area."

The Louisiana Severance Tax is also an income tax within the meaning of the Buck Act. It is measured not in money but by the volume of minerals served.

Article 10, Section 21, of the Louisiana Constitution specifically provides that the measure may be in money or quantity.

> "Such natural resources may be classified for the purpose of taxation and such taxes may be predicted upon either the quantity or value of the products at the time and place of the severance." (emphasis supplied)

By authority of the constitutional provision above quoted, Louisiana originally, by Act 140 of 1922, levied a severance tax on gross market value. Act No. 5 of 1928 changed the basis of the tax to quantity served. Louisiana therefore respectfully submits that the Buck Act which ceded jurisdiction to the states in certain areas of taxation is applicable to the instant case for the reason that the term "gross receipts" as used in the act authorizes a state tax within a federal enclave on entities within the jurisdiction of the state when the tax is a privilege tax and the amount of the tax is measured by the extent the privilege is exercised.

The above argument was made in the Fifth Circuit and in reference thereto that Court stated:

> ". . . the Louisiana severance tax is simply not an income tax. We are not free to expand the technical and precise language that Congress has used."

Perhaps the Fifth Circuit felt that way because it is an inferior appellate court. However, as we understand the *Howard Case, supra,* the United States Supreme Court interprets the Buck Act as Congress' intention to remove the cloak of federal immunity from private enterprises which do business in federal en-

claves. The removal of immunity does not extend to ad valorem taxes as is shown by *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L.Ed. 2d 782, 84 S.Ct 857 (1964). However, it does remove the cloak of immunity with respect to any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. It is submitted that the Louisiana severance tax is such a tax.

PRAYER

For the foregoing reasons petitioner prays that a writ of certiorari be granted. The printed record herein, including the proceedings in the Court of Appeals for the Fifth Circuit is enclosed herewith.

Respectfully submitted,
s/ Emmett E. Batson
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CERTIFICATE OF SERVICE

I, EMMETT E. BATSON, attorney of record for petitioner, do hereby certify that I have this day served a copy of the foregoing petition with appendicies on the Solicitor General of the United States and on each of the attorneys of record of the respondents as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid to those over 500 miles away and first class postage to those less than 500 miles distant.

Feb. 22, 1968

s/ Emmett E. Batson

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